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6 Attorneys for Plaintiff and Counterdefendant AntiCancer, Inc.
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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
11

12 ANTICANCER, INC., a California
corporation,

13 Plaintiff,

14 v.

15 PERRY SCIENTIFIC, INC., a Nevada
16 corporation; ANDREW PERRY, a
natural person; and DOES 1-30,

17 Defendants.
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20 PERRY SCIENTIFIC, INC., a Nevada
corporation; ANDREW PERRY, a
21 natural person,

22 Counterclaimants,

23 v.

24 ANTICANCER, INC., a California
corporation,

25 Counterdefendant.
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27
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Case No. 07CV0778 JAH

DECLARATION OF DAN LAWTON RE
ORDER TO SHOW CAUSE

Date: September 27, 2007
Time: 9:00 a.m.
Place: Courtroom A
Before: Hon. Barbara Lynn Major

1 I, Dan Lawton, declare:

2 1. I am licensed to practice before this Court and am counsel of record for
3 AntiCancer, Inc., plaintiff and counterdefendant, in the above-entitled action.

4 2. Everything in this declaration is true and correct of my own personal
5 knowledge, and if called to testify in court, I could and would testify competently thereto. I
6 make this declaration in response to the order of the Magistrate Judge of August 30, 2007, in
7 the wake of my failure to appear at the ENE conference on August 29, 2007.

8 3. At the outset, I wish to reiterate my apology to the Court and to counsel and his
9 client (first made during the telephonic conference held on September 5) for my failure to
10 appear. I know that all concerned take the ENE process (which is a great service to litigants
11 and to the public) very seriously and that the no-showing of a side at an ENE frustrates the
12 investment that both the court and litigants in that counsel make in the process. I'm deeply
13 sorry for my and my client's failure to appear, which is solely my (and not my client's)
14 responsibility (for the reasons explained below).

15 4. My failure to appear was the result of my failure to calendar the ENE.
16 Ordinarily, the electronic calendaring system in our office works very well, with all dates and
17 deadlines calendared correctly and attorneys apprised of upcoming hearings and other events
18 in advance so as to ensure proper preparation and appearances. In this instance, however, I
19 failed to ask my paralegal to calendar the hearing and thus it never appeared on my electronic
20 or paper calendars. I expect this was the result of my failure to print the Magistrate Judge's
21 Order setting the ENE (which Order I expect we received via electronic mail). My lapse is
22 inexplicable except as a result of neglect on my part. Never before have I failed to appear at
23 an ENE or other hearing in this Court. I, and only I, am to blame for this horrible mistake.
24 Ordinarily, I receive the ENE conference statements from opponents in advance of the ENE
25 conference. I did not receive one from Attorney McMillan in this case. Had I received one,
26 it would have alerted me immediately to the fact that there was an ENE scheduled for August
27 29.

28 ///

1 5. Because of my mistake, on August 29, I was scheduled to appear (and did
2 appear) at the U.S. District Court in the Central District of California at the deposition of
3 U.S. District Court Judge Stephen V. Wilson in an unrelated case, *In re Mildred Borden*
4 *Living Trust*, Case No. P080431 (a case in which Judge Wilson is a third-party witness). The
5 deposition of Judge Wilson was set consistent with what Judge Wilson's calendar and
6 schedule allowed (which was a deposition going from 10:00 a.m. to about 1:00 p.m. on
7 August 29), and this caused my client and I to travel on Amtrak, departing San Diego at 6:10
8 a.m. and returning back in San Diego until 5:00 p.m. that day.

9 6. The other attorney in my office, Joe Kracht, was in Hawai'i that same day
10 covering two depositions in a third case, *Guddee v. Abudanza, Inc.*, Case No. CV06 00664
11 SOM KSC (and thus was unavailable to cover either the ENE in this case or Judge Wilson's
12 deposition in the *Borden Living Trust* case in Los Angeles).

13 7. To make matters worse as far as scheduling, my client, Dr. Robert Hoffman,
14 was on a previously-scheduled business trip to Japan on August 29 (a trip from which he did
15 not return until Tuesday, September 4).

16 8. I believe that all of these calendar conflicts would have required me to ask the
17 Court for a postponement of the August 29 ENE in any event (or else a rearranging of all of
18 the travel and Judge Wilson's deposition which conflicted with it). This is not to excuse
19 whatsoever my failure to appear on August 29, but it does give some idea of the various
20 conflicts in the calendars of the persons involved on that date.

21 9. As for 26(f), defense counsel and I did attempt to meet and confer and
22 discharge our obligations under that rule. We did meet at my office on May 10, 2007 to
23 discuss the case (although it was not yet time to have the 26(f) conference). Thereafter, we
24 tried (but failed) to have a telephone conference on August 3 at 2:30 p.m. As I recall it, Mr.
25 McMillan called me at the time (I was unavailable); when I called him back later he was
26 unavailable and thereafter on vacation to Florida with his family. We agreed to reset the
27 26(f) conference for Monday, August 6 (by which time Mr. McMillan was in Florida) but for
28 some reason we did not have a complete discussion as was required. As the Magistrate

1 Judge correctly pointed out, as plaintiff's counsel I (and no one else) has the responsibility
2 for seeing to it that the 26(f) conference is held and that initial disclosures are made timely.
3 Again, this is something which is my fault and my fault alone. As ordered by the Magistrate
4 Judge on September 5, we made our initial disclosures on Friday, September 7, and served
5 those initial disclosures via hand delivery on defense counsel (I have yet to receive his). I
6 tried to have the 26(f) conference with defense counsel on Thursday and Friday (September 6
7 and 7), but defense counsel was tied up in depositions and court appearances on those days
8 and unable to confer with me. Mr. McMillan was available today and we just had a complete
9 26(f) conference a few minutes ago, completing all items (except for dates already set by the
10 Magistrate Judge, which are a *fait accompli*) prescribed by Form 35 ("Report of Parties'
11 Planning Meeting") contained in the Federal Rules of Civil Procedure.

12 10. As for any sanctions to be imposed in this case, there is no basis for imposing
13 them on my client (who is utterly unaware of all of this). Any sanction should be imposed on
14 myself and myself alone.

15 I declare under penalty of perjury under the laws of the United States that the
16 foregoing is true and correct.

17 Executed this 12th day of September 2007 at San Diego, California.

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20 s/Dan Lawton
21 Dan Lawton
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18 Defendants.
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20 PERRY SCIENTIFIC, INC., a Nevada
corporation, and ANDREW PERRY, a
natural person,
21

22 Cross-Complainants,
23

24 v.

25 ANTICANCER, INC., a California
corporation,
26

27 Cross-Defendants.
28

Case No. 07 CV 0778 JAH (BLM)

PROOF OF SERVICE

1 I, Emi Kotani, declare that:

2 I am over the age of eighteen years and not a party to this action; and I am employed
3 at Lawton Law Firm, whose business address is 550 West C Street, Suite 1400, San Diego,
California, 92101.

4 On September 12, 2007, I served the foregoing document(s) described as:

5 DECLARATION OF DAN LAWTON RE ORDER TO SHOW CAUSE

6 on all interested parties in this action by placing [X] a true copy [] original thereof enclosed
7 in sealed envelopes addressed as follows:

8 Shawn A. McMillan, Esq.
9 THE LAW OFFICES OF SHAWN A. McMILLAN, APC
10 4955 Via Lapis
San Diego, CA 92122
11 (858) 646-0069
(206) 600-4582 (Fax)

12 **Attorneys for Defendants**

13 [] (BY FACSIMILE) The facsimile machine I used complied with Rule 2003(3) and no
14 error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine
to print a record of transmission.


15 [X] (BY MAIL, 1013a, 2015.5 C.C.P.) I am readily familiar with this firm's practice of
16 collection and processing of correspondence for mailing. Under that practice, this
document will be deposited with the United States Postal Service on this date with
17 postage thereon fully prepaid at San Diego, California, in the ordinary course of
business. I am aware that on motion of the party served, service is presumed invalid if
18 the postal cancellation date or postage meter date is more than one day after the date
of deposit for mailing in the affidavit.

19 [] (BY PERSONAL SERVICE) I caused the foregoing envelope to be delivered by hand
20 to the offices of the addressee(s).

21 [] (BY HAND DELIVERY) I delivered the foregoing envelope by hand to the offices of
the addressee(s).

22 I declare under penalty of perjury under the laws of the United States that the
23 foregoing is true and correct.

24 Executed on September 12, 2007 at San Diego, California.

25
26 
27 EMI KOTANI
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